

OFFICE MEMORANDUM

TO: Board of Environmental Review

FROM: David Rusoff, DEQ Deputy Chief Legal Counsel

SUBJECT: HB 521 and HB 311 review for proposed repeal, amendment, and adoption of air quality rules pertaining to visibility protection, MAR Notice No. 17-168

DATE: October 8, 2002

HB 521 REVIEW

(Comparing Stringency of State and Local Rules
to Any Comparable Federal Regulations or Guidelines)

Sections 75-2-111 and 207, MCA, codify the air quality provisions of House Bill 521, from the 1995 legislative session, by requiring the Board of Environmental Review to make certain written findings after a public hearing and public comment, prior to adopting a rule to implement the Clean Air Act of Montana that is more stringent than a comparable federal regulation or guideline. By its express terms, HB 521 applies only when there is a comparable federal regulation or guideline.

The proposed rulemaking is intended to conform the State's rules to the requirement in federal statutes (42 U.S.C. § 7491) and regulations (40 CFR § 51.300, et seq.) that states adopt programs to improve visibility impairment reasonably attributable to existing major stationary sources of air pollutants. The proposed amendments, repeal, and new rules would not make the State's rules more stringent than comparable federal regulations or guidelines. Most of the proposed rulemaking would merely adopt language from, or incorporate documents referenced in, the federal regulations.

The only material difference between the proposed rulemaking in the published notice of rulemaking and the comparable federal regulations is that the proposed State rules would allow the State, rather than EPA, to make decisions on applications for exemptions from best available retrofit technology (BART) (New Rule II). However, this procedural provision would not make the State rules more stringent than the federal regulations.

At the public hearing, the Department intends to propose that the Board revise proposed New Rule III(2) to add a procedure for issuing preliminary orders concerning BART analyses and holding

public hearings on the preliminary orders. This procedure is not provided under the federal regulations. However, adding this procedure would not make the State rules more stringent than the comparable federal regulations; it would merely provide a different procedure in which the owner or operator of the source and the public could comment on the preliminary order.

Therefore, no further HB 521 analysis is required.

HB 311 REVIEW
(Assessing Impact On Private Property)

Sections 2-10-101 through 105, MCA, codify House Bill 311, the Private Property Assessment Act, from the 1995 legislative session, by requiring that, prior to taking an action that has taking or damaging implications for private real property, an agency must prepare a taking or damaging impact assessment. Under Section 2-10-103(1), MCA, "action with taking or damaging implications" means:

a proposed state agency administrative rule, policy, or permit condition or denial pertaining to land or water management or to some other environmental matter that if adopted and enforced would constitute a deprivation of private property in violation of the United States or Montana constitution.

Section 2-10-104, MCA, requires the Montana Attorney General to develop guidelines, including a checklist, to assist agencies in determining whether an agency action has taking or damaging implications.

The present proposed action involves rules affecting use of private real property, and the Board has discretion legally not to take the action. So, HB 311 applies to this proceeding.

As discussed above, the proposed new rules and proposed amendments would not make the State rules more stringent than the comparable federal regulations. Also, rulemaking is required by federal statute and regulation. However, the proposed rulemaking would increase regulation of private real property by requiring BART for certain existing major stationary sources that cause or contribute to impairment of visibility in mandatory Class I federal areas.

I've completed an Attorney General's Private Property Assessment Act Checklist, which is attached to this memo. The proposed rulemaking would not:

- * result in either a permanent or indefinite physical occupation of private property;
- * deprive any owner of all economically viable uses of private property;

- * deny a fundamental attribute of private property ownership;
- * require a private property owner to dedicate a portion of property or grant an easement;
- * have a severe impact on the value of private property; or
- * damage private property by causing a physical disturbance with respect to the property in excess of that sustained by the public generally.

Based upon completion of the attached Attorney General's Checklist, the proposed rulemaking does not have taking or damaging implications and no further HB 311 assessment is required.

Enc.

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